Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-749

C.M.C., a Minor by Martin Conway. Her Guardian Ad Litem, and C. M., Her Mother and Natural Guardian, and State of Minnesota

Appellees,

vs.

A. P. F.,

Appellant.

JURISDICTIONAL STATEMENT AND APPENDIX

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55404

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C. M. C., a Minor by Martin Conway, Her Guardian Ad Litem, and C. M., Her Mother and Natural Guardian, and State of Minnesota,

Appellees,

vs.

A. P. F.,

Appellant.

JURISDICTIONAL STATEMENT

Comes now the Appellant herein and respectfully shows the Court, pursuant to Rule 15 of the Supreme Court of the United States:

(a) The official opinion is Minnesota Supreme Court No. 97, Per Curiam, cited

at ___ Minn. ___, 257 N.W. 2d 282 (1977)
A corollary and contrasting opinion (which was cited in the Petition for Rehearing) delivered by Minnesota Fourth Judicial District Judge Susanne C. Sedgwick on April 27, 1977, declaring the Minnesota Paternity Statute unconstitutional is condensed in the Appendix. Neither the Trial Court nor the Appellate Court below would consider the constitutionality in this case although specifically requested in pre-trial motions, the answer, post-trial motions and in the appeal and a petition for rehearing below. Judge Sedgwick's decision is unreported*, has not been appealed and the time for appeal has passed. The present situation in

*Fourth Judicial District, County of Hennepin, District Court, Family Court Division File No. 6977 Ill. Findings of Fact, Conclusions of Law and Order for Judgment Filed April 27, 1977: William C. __ & Carol C. __, Plaintiffs, vs. Robert L. __Defendant.

Minnesota is that the Paternity Statute is unconstitutional in one case and in this case, its constitutionality or unconstitutionality is ignored.

(b) Jurisdiction is invoked on the following grounds:

(i) This is an appeal from a Judgment of the Minnesota Supreme Court upholding the application of the state's Paternity Statute to the Appellant herein over his objections as to its constitutionality. The said Judgment of the Minnesota Supreme Court draws into question the validity of a state statute that imposes exclusive liability for reasonable expenses of pregnancy and confinement, suitable maintenance of mother, necessary support, education, funeral expenses and mother's attorney's fees on the father of a child born out of wedlock; on the other hand, no resp-

onsibilities or liabilities of any nature are imposed upon the mother of a child born out of wedlock. The statutes pursuant to which this appeal is brought are 28 U.S.C.A. 1257 (2), 28 U.S.C.A. 2106 and 28 U.S.C.A. 2101 (c).

(ii) The date of the original opinion of the Minnesota Supreme Court is July 15, 1977. A Petition for Rehearing was filed on July 25, 1977 and was denied on August 31, 1977 and the Judgment entered on that date. The Notice of Appeal was filed with the Clerk of the Minnesota Supreme Court who is possessed of the record on the 18th of November, 1977.

(iii) 28 U.S.C.A. 1257 (2) - pertinent provisions as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be received by the Supreme Court as follows:

> (1) . . .
>
> (2) By appeal, where is drawn into question the validity of a statute of any state on the grounds of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." (Compare 28 U.S.C.A. 2103 insofar as it may be relative to corollary issues.)

28 U.S.C.A. 2106:

> "The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

(iv) The following cases, it is believed, amply sustain the exercise of jurisdiction in this case:

Reed v. Reed, 404 U.S. 71 (1971);

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972);

Frontiero v. Richardson, 411 U.S. 677 (1973);

Stanton v. Stanton, 421 U.S. 7 (1975);

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975);

Craig v. Boren, ___ U.S. ___, 97 S. Ct. 451 (1976).

See also:

Brenden v. Independent School District 742, 477 F. 2d 1292, 1300 (8th Circuit, 1973);

White v. Fleming, 522 F. 2d 730, 736 (7th Circuit 1975);

Kalina v. Railroad Retirement Board, 541 Fed. 2d 1204 (6th Circuit 1976);

Cramer v. Virginia Commonwealth University, 415 Fed. Supp. 678 (East. Dist. Va., 1976);

Stanley v. Illinois, 405 U.S. 645, 646 (1972);

State of Arkansas v. Fairfield Communities Land Co., 260 Ark. 277, 538 S.W. 2d 698 (1976);

Commonwealth v. MacKenzie, ___ Mass. ___, 334 N.E. 2d 612, 615 (1975).

(v) The following are the pertinent portions of the State Statute involved herein: officially cited as Minnesota

Statutes, 1971, Chap. 143, also cited as Laws, 1971, Regular Session Chapter 143, S.F. No. 153, also known as Chapter 257, Minnesota Statutes Annotated, Major section 257.251:

". . .

257.251 Obligations of father

The father of a child born out of wedlock is liable, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement, including her suitable maintenance for not more than eight weeks next prior and not more than eight weeks thereafter, and for the education, necessary support and funeral expenses of the child. A child born out of wedlock includes a child born to a married woman by a man other than her husband.

. . .

257.252 Enforcement

Paternity may be determined upon the civil complaint of the mother, child, or the public authority chargeable by law with the support of the child. If paternity has been determined or has been acknowledged according to the laws of this state, the liabilities of the father may be enforced in the same or other proceedings (1) by the mother, child or the

public authority which has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses, or (2) by other persons to the extent that they have furnished the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses.

. . .

257.257 Remedies

The district court has jurisdiction of a civil action under Sections 257.251 to 257.259, 257.261 to 257.264 and 257.27 to 257.33 and all remedies for the enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, necessary support, or funeral expenses for legitimate children apply. The court has continuing jurisdiction to modify or revoke a judgment for future education and necessary support. All remedies under the Uniform Reciprocal Enforcement of Support Act are available for enforcement of duties of support under sections 257.251, to 257.259, 257.261 to 257.264 and 257.27 to 257.33.

. . .

Subd. 3. In any proceeding brought pursuant to sections 257.251 to 257.259 and 257.261 to 257.264, the mother of an illegitimate child may recover the costs of the act-

ion paid or incurred by her, including a reasonable amount for attorney's fees.

Sec. 11. Minnesota Statutes 1969, Chapter 257, is amended by adding a section to read:

257.262 Contempt

A defendant who fails to comply with any order of the court is guilty of civil contempt of court, and shall also be subject to all penalties for failure to care for and support such illegitimate child, which are or shall be imposed by law upon the father of a legitimate child of like age and capacity.

. . .

257.263 Security

The court may require the alleged father to give bond or other security for the payment of the judgment."

(c) The question presented by this appeal is whether or not Minnesota Statutes 257.251 (major de facto section), et seq., specifically, 257.252, 257.257, 257.258, Subd. 3, 257.262 and 257. 263 are unconstitutional because they deny the Appellant herein equal protection of the law in that they arbitrarily, solely on the bas-

is of sex, treat him differently than they do the female Respondent when both are similarly situated as adjudicated parents of an illegitimate child.

(d) This is an appeal from a Judgment of the Minnesota Supreme Court in an illegitimacy proceeding affirming the constitutionality of that state's Paternity Statu[illegible]pplication to the Appnerein by adjudging the putative father Appellant solely liable on the basis of sex to pay ALL reasonable expenses of pregnancy and confinement, ALL suitable maintenance of the mother, ALL the mother's attorney's fees, ALL necessary support, ALL education and funeral expenses of the illegitimate child without regard to the financial abilities of the respective parents. Such Judgment and statutory bases therefore clearly discriminate against men in favor of women, without justification and violating the Equal Protection Clause of the United States Constitution.

The constitutional question was first raised in the Answer to the Complaint. (Paragraph VI, P. 2, Answer, Dec.,1971) It was raised again in a pre-trial motion of September, 1972, requesting dismissal of the Complaint. The trial court affirmed constitutionality by implication although ignoring the issue in its ruling. The matter was again brought to the trial court's attention in a motion dated October 20, 1972, Paragraph 1. It was again ignored but affirmed by implication. It was next raised in Appellant's post- trial motion for a new trial, Paragraph 34, filed December 5, 1975, and printed in Appellant's Brief and Appendix below, P.

A-23 (e.g., Pp. 19-25). The trial court again ignored the constitutionality argument but denied the motions, (Appellant's Brief below, P. A-26) and by implication affirmed constitutionality.

The issue was raised in Appellant's Brief below at Page 6 and argued at Pages 44-46. The Minnesota Supreme Court in a Per Curiam decision stated that the issue was raised but refused to consider it saying only ". . . We affirm . . . " Judge Sedgwick's decision, declaring the statute unconstitutional under Federal Equal Protection during the consideration of the instant case, was brought to the attention of the Minnesota Supreme Court in our Petition for Rehearing which was filed on July 21, 1977. On August 31, 1977, a printed one sentence denial without mention of Judge Sedgwick's brilliant and

scholarly decision or the constitutional issue was rendered by the Minnesota Supreme Court, and Judgment was entered on that date, i.e., August 31, 1977. (See Order of Minnesota Supreme Court, dated August 31, 1977, Appendix, Page A-26; Petition for Rehearing, Pp. 1-4, July 21, 1977.)

(e) The Federal question of anachronistic and unconstitutional gender discrimination in paternity proceedings is one of the major political and economic problems of our time. The placing of total financial responsibility on a putative father but allowing the mother to be free of obligation is contrary to the realities of modern America. The portions of Judge Susanne Sedgwick's decision appended hereto are incorporated herein by reference in support of the content-

ion of a substantial Federal question requiring plenary consideration. (See Appendix, Pp. A-4 through A-26.) The thousands of men who are being actively discriminated against throughout the United States under comparable paternity statutes make an early consideration of this matter of paramount importance.

As Judge Susanne Sedgwick states:

". . . The state's interest in enforcing its paternity statute seems to be for the purpose of indemnifying both society and the mother.

It is inconsistent with the current status of women to require the father to bear the financial burden to recompense the mother for social ostracism . . . To the extent that the Minnesota Statute fails to permit consideration of the relative obligations and financial abilities of both the father and mother of an illegitimate child by applying an identical standard to the father and mother, it is unconstitutional.

The statute assigning the obliga-

tion of paying . . . solely to the father is not rationally related to the legislative objective of indemnifying sociaty against the expense of supporting the child. The same objective is more fairly and substantially achieved by apportioning the expense between the two parents, after a hearing to determine their respective abilities to pay." (Decision, Fourth Judicial District, filed April 27, 1977, cited supra, see Appendix Pp. A-4 through A-26.)

(h) See Appendix.

(i) See Appendix.

(j) See Appendix.

The judgment of the Minnesota Supreme Court should be reversed and the Paternity Statute of that state declared unconstirurional as a breach of fundamental equal protection of the law.

Respectfully submitted,

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Dated: November 21, 1977.

APPENDIX

(TITLE OF CAUSE)

Endorsed
Filed July 15, 1977
John McCarthy,
Clerk,
Minnesota Supreme Court

O P I N I O N

PER CURIAM.

This is a paternity action pursuant to Minn. St. 257.251 to 257.31. The case was tried in two parts. The first part of the trial, which resulted in a finding of paternity, was tried before a jury. The second part, dealing with damages alone, was tried without a jury. Defendant raises numerous issues on appeal including whether he received a fair jury trial, whether there was sufficient evidence to support a finding of paternity, whether the court applied the proper standards in determining the amount of damages, whether the evidence supports the award, and whether the paternity statutes are constitutional. We affirm.

The only issue which merits discussion if whether defendant was prejudiced

when complainant's attorney called a witness and asked him if he had administered a lie detector test concerning complainant. In view of our long-standing prohibition against lie detector evidence, this question was clearly improper. If this were a criminal case, we would more than likely reverse in such a situation. However, paternity cases are civil in nature, and therefore, a greater showing of prejudice to defendant is required before we would grant a new trial for such an error.

The evidence of defendant's paternity included complainant's positive testimony and strong evidence corroborating her testimony. For example, there was corroboration of complainant's testimony concerning the private quarters of defendant where the act of conception allegedly occurred and of her testimony that she had a date with defendant the night conception allegedly occurred. There is also evidence that defendant attempted to get a former client of his to marry complainant. Under these circumstances it is highly un-

likely that the improper question concerning the lie detector test prejudiced defendant.

There are strong arguments both for and against admitting lie detector test results. McCormick, Evidence (2 ed.) §§ 207. The case for admissibility is certainly strongest in civil cases such as paternity cases where it is often very difficult to acquire the necessary proof. While undoubtedly in the future we will have to consider whether lie detector test results should be admissible at least in limited contexts such as this, this is not the proper case for doing so.

We note with disapproval that the district court on the motion of defendant issued an ex parte order striking the names of the parties and inserting initials in lieu thereof. Minn. St. 257.31 does provide for the privacy of "records" of paternity proceedings; however, in no way does this provision permit the concealment of the names of the parties to the action.

Affirmed.

MR. JUSTICE OTIS and MR. JUSTICE SCOTT took no part in the consideration or decision of this case.

* * * * * * * * * *

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT-FAMILY COURT DIVISION
William C. and Carol C. Plaintiffs vs. Robert L. Defendant.	File No.6977 ILL. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

. . .

FINDINGS OF FACT

. . .

VI.

That the child is illegitimate, and this action is brought pursuant to M.S.A. 257.251 to compel Defendant to pay all necessary medical expenses together with legal expenses incidental to this action.

VII.

That M.S.A. 257.251, et seq., insofar as it requires the father to assume and pay all necessary medical expenses incident to the birth of an illegitimate child,

without regard to the financial abilities of the respective parents, discriminates against men in favor of women, and violates the Equal Protection Clause of the United States Constitution.

. . .

IX.

That Plaintiff-mother is financially able to contribute to medical expenses incurred as a result of the borth of her child.

. . .

CONCLUSIONS OF LAW

I

That Defendant is the father of the minor child named in the complaint.

II.

That Minnesota Statute 257.251 is unconstitutional because it denies Defendant equal protection of the law, in that it arbitrarily, solely on the basis of sex, treats him differently than it does Plaintiff when both are similarly situated, being the parents of an illegitimate child.

. . .

That each party shall be responsible for his or her own attorney's fees incurred herein.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/Susanne C. Sedgwick
Judge of District Court

Dated: April 25, 1977

. . .

MEMORANDUM

. . .

Defendant contends that Minnesota Statute 257.251 is unconstitutional because it denies him equal protection of the law in that it, arbitrarily, solely on the basis of sex, treats him differently than it dies plaintiff when both are similarly situated, both being the parents of an illegitimate child.

The Fourteenth Amendment to the United States Constitution states:

> ". . . Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws."

In Brenden v. Independent School Dist-

rict 742, 477 F. 2d 1292 (8th Cir. 1973), which seems to be the most recent 8th Circuit equal protection decision, the Court said that in evaluating a claim that state action violates the Equal Protection Clause, three criteria must be considered; the character of the classification in question, the individual interests affected by the classification, and the governmental interests asserted in support of the classification. In this case there is no question that a classification is created. The statute states unequivocally, "The father of a child born out of wedlock is liable . . . for the reasonable expense of the mother's pregnancy and confinement . . ." There is no provision in the statute for apportioning the expense of the pregnancy between the two parents. Holding the father, but not the mother, liable for the expenses of the pregnancy sets up a gender-based classification.* Although the parties are similarly situated, each being the parent of the illegitimate child, and each having parti-

* (Emphasis ours)

cipated in bringing the child into being, they are treated dissimilarly with regard to liability for the expenses of the pregnancy. The statute assigns that obligation solely to the male parent. (Emphasis ours)

The United States Supreme Court has held that a statute which provides different treatment on the basis of sex establishes a classification subject to scrutiny under the Equal Protection Clause. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton 421 U.S. 7, (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, _____ U.S. _____, 97 S.Ct.451 (1976).

Having determined that sex-based classifications are subject to scrutiny, it is necessary to determine the standard of review against which the questioned status is to be measured. (Emphasis ours)

Traditionally the United States Supreme Court has used two tests to analyze statutory classifications which are claimed to violate the Equal Protection Clause. If the classification affects the exercise

of a "fundamental right" such as speech, or creates a "suspect class," i.e., one based on race, alienage, or national origin, then the state must show that the classification is necessary to serve a compelling government interest. Other kinds of classification which do not effect fundamental rights or create suspect clauses will be sustained if they are merely reasonable and are rationally related to the object of the legislation. The following standard we set forth by the United States Supreme Court in Reed v. Reed, 404 U.S. 71 (1971):

> ". . . A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike.'" 404 U.S. at 76. ICitation omitted and emphasis added.)

The Court of Appeals for the Eighth Circuit, in applying this standard, explained that the Supreme Court's definition of what constitutes a rational relationship has become more rigorous,

and the high Court has become "less willing to speculate as to what unexpressed legitimate state purposes may be rationally furthered by a challenged statutory classification." Brenden v. Independent School District 742, 477 F. 2d 1292, 1300 (8th Cir. 1973) (citing Green v. Waterford Board of Education, 473 F. 2d 629, 633 [2nd Cir. 1973]). The Eighth Circuit declined to adopt a particular standard of review in Brenden, supra.

The Seventh Circuit has also skirted the issue of whether to judge sex-based discrimination by the rational basis or the compelling government interest test. In its most recent Equal Protection case, which invalidated a Milwaukee ordinance prohibiting female tavern patrons from sitting with male patrons or from standing at the bar, it said:

> "The precise terms of the test ultimately to be evolved by the Supreme Court for judging the validity of a classification based on sex cannot now be determined. But whatever formulation the court may ultimely adopt, it can at least be divined from the

> authorities discussed above that we may not accept a classification based on sex without further inquiry as to whether the difference between men and women rationally justifies the classification." White v. Fleming, 522 F. 2d 730, 736 (1975).

The United States Supreme Court has found sex to be a suspect classification in only one case, Frontiero v. Richardson, 411 U.S. 677 (1973). The United States Supreme Court has not adopted either the rational basis test or the compelling government interest test for analyzing sex-based classifications. In Stanton v. Stanton, 421 U.S. 7 (1975) the court stated that it found it unnecessary to determine whether classification based on sex are inherently suspect. Instead, the Court found Reed to be controlling:

> "In upholding the challenge, the court reasoned that the Idaho statute accorded different treatment on the basis of sex and that it thus establishes a classification subject to scrutiny under the Equal Protection

> Clause. (Citation omitted). The Clause, it was said, denies to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes of the basis on criteria wholly unrelated to the objective of that statute."

In the most recent challenge to a sex-based statute, the Supreme Court, citing Reed, stated that, "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, ___ U.S. ___, 97 S.Ct.451. (Emphasis ours)

"Based on the absence of any clearly enunciated standard of review for equal protection challenges to sex-based classifications and on the United States Supreme Court's use of a standard somewhere between the two traditional standards, the applicable standard is that set forth in Craig v. Boren, as amplified by prior decisions. That standard is one which

would require the state to show that the statute furthers important governmental objectives and that it is fairly and substantially related to the achievement of those objectives. Craig v. Boren, supra at 457. (Emphasis ours.)

It is apparent that if the statute cannot withstand scrutiny under this test it cannot meet the compelling state interest test which would require an even stronger showing of the legitimacy of the governmental interests assertedly served by the statutory classification.

We must next look at the individual interests asserted under the equal protection claim. The basic interest of the defendant is to bear only those financial obligations which are attributable to his actions; that is, to be required to pay an amount of the confinement expenses of the pregnancy based on his ability to pay and the nedd of the mother for financial assistance. That this is a fair proposition was recognized by the United States Supreme Court in Weber v. Aetna Casualty and Surety Co.,

406 U.S. 164 (1972).

> ". . . since sex, like race and national origin, is an immutable characteristic, determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to legal responsibility." Weber, at 175.

. . .

It is clear that the paternity statute is designed to prevent the public from being required to support illegitimate children.

There is also authority for the position that the paternity statute is designed to benefit the mother.

. . .

The Minnesota Supreme Court in State v. Carmena has held that although a child is not likely to become a public charge, the mother may institute proceedings against the putative father by retaining her own attorney.

Minnesota Statutes §§257.252 further indicates that the statute is intended to

benefit the mother regardless of whether the child will become a public charge.

> "If paternity has been determined or acknowledged. . . the liabilities of the father may be enforced in the same or other proceedings (1) by the mother, . . . or (2) by other persons to the extent that they have furnished the reasonable expenses of pregnancy, confinement . . . "

Therefore, the state's interest in enforcing its paternity statute seems to be for the purpose of indemnifying both society and the mother. (Emphasis ours.)

It is inconsistent with the current status of women to require the father to bear the financial burden to recompense the mother for social ostracism as suggested by the Jeffrey case.*

* 1943 was the earliest year for which statistics on birth status were complied by the State Department of Public Welfare. In that year illegitimate births were 2% of total births. In 1975 illegitimate births comprised 23.8% of all births in the City of Minneapolis, with over 90% of the mothers keeping their babies as cpposed to placing them for adoption. The illegitimacy rate has risen by 12% per year for the past few years. The increased popularity of illegitimate births

Decided Minnesota cases conclusivelv show that the indemnification rationale cannot be supported on some theory of punishing the male. As stated in State v. Jeffrey, 183 Minn. 476, 247 N.W. 692, 693 (1933): "To some extent the proceeding is a reparation measure. Certainly it is not prosecuted for the purpose of punishing the defendant." Further, if one-sided punishment were the underlying basis for the statute, it would be unconstitutional without question. See Commonwealth v. McKenzie, ___ Mass. ___ 334 N.E. 2d 613 (1975).

It appears that the basis for the statute's singling out the male is the assumption that the male parent is better able than the femal parent to provide the indemnification deemed necessary. But such a conclusive presumption is unreasonable and arbitrary. It is quite analogous to the arguments advanced by the State of Idaho when it was trying to preserve its

in recent years appears to make the ostracization reasoning of the Jeffrey case anachronistic. Source: Minnesota Department of Public Welfare.

conclusive legislative presumption that men were better qualified to be administrators of decedents' estates than were women. To support its position Idaho argued that its conclusive presumption was a method "devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives." Reed v. Reed, 465 P. 2d 635, 638 (Idaho, 1970) (Reversed by the United States Supreme Court in Reed v. Reed, 404 U.S. 71 (1971).

The United States Supreme Court rejected those arguments and held the Idaho probate statute unconstitutional. The statute in question accorded different treatment to males than it did to females solely because of the applicant's sex. Thus, the law created a classification which had to be held up to the Equal Protection Clause.

The Supreme Court then held that the Equal Protection Clause denied states "the power to legislate that different treatment be accorded to persons placed

by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." 404 U.S. at 75-76. (Emphasis ours.) The Court went further and concluded:

> "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." 404 U.S. at 75. (Emphasis added.)

Following Reed, the Supreme Court, in Frontiero v. Richardson, 411 U.S. 677 (1973) held unconstitutional as violative of equal protection a military regulation that female officers applying for benefits for their spouses prove that their husbands were dependant upon them for over half of their support when there was no requirement that husbands prove that wives were dependent on them for over half of their

support. There the Court, in a plurality opinion, held that the proper standard was even higher than that espoused in Reed and that undecided by Stanton. In Frontiero it said:

> ". . . We can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. (Emphasis added.)

The government had argued that there was an administrative convenience in concluding that most husbands were not dependent upon their wif(v)es because of the greater earning capacity of husbands. Therefore, it alleged, a classification that required officer wives to prove the dependence of their husbands was based on a rational reason. The Court made short shrift of the argument of administrative convenience, stating:

> "The Constitution recognizes higher values than speed and efficiency." 411 U.S. at 690. Citing Stanley v. Illinois, 405 U.S. 645, 646 (1972) (Illegit-

imate fathers are entitled to hearings before their parental rights can be terminated.)

Thus, it is improper to assume that all women, because they are pregnant, are not able to provide for their own medical expenses, and that all men who father illegitimate children are always able to bear the entire burden of the medical expenses. While the generalization may be true in some cases, the state may not rely on generalized assumptions about the roles of the sexes in attempting to indemnify society against the cost of/birth of illegitimate children. And although the asserted purpose may be to indemnify the mother as well, concluding that her incapacitation is due to the father's actions, this in itself is an archaic stereotype and an impermissible conclusion.

> "But a mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Eisenstadt v. Baird, 405 U.S. 438 (1972).

Most of the Court's sex discrimination decisions have involved discrimination a-

gainst women. Yet the Court has found that gender-based classifications which discriminate against men are also subject to scrutiny. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). In Weinberger, the Court invalidated a section of the Social Security Act which permitted benefits to be paid to widows, but not to widowers. Justice Brennan found that the gender-based distinction in Weinberger was indistinguishable from that invalidated in Frontiero v. Richardson, 411 U.S. 677 (1973).

The State of Illinois was not allowed to conclusively presume that unwed fathers were unfit custodians for their minor children:

> "The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than, mediocre one." Stanley v. Illi-

nois, 405 U.S. 645, 646 (1972).

Other recent cases have struck down statutes which embodied archaic and overbroad assumptions in sex-based classifications.

In Cramer v. Virginia Commonwealth University, 415 Fed.Supp. 673 (E.D.Va. 1976) the District Court, declaring that it was applying the rational basis test, overturned the hiring of a less-qualified female applicant over a better-qualified male applicant. The Court rejected the notion of compensatory discrimination and said:

> "The Court interprets the Equal protection Clause as requiring that where sex is the sole factor upon which differential treatment is determined, there is no constitutional justification for treating the sexes differently. (Citation omitted) The Court can conceive of no rational relationship between gender and suitability for being hired in this case . . . Furthermore, no Supreme Court decision allowing state-imposed disparities in treatment based on sex have approved discrimination against one sex in favor of another." Cramer, at 677, citing Schlesinger v. Ballard, Geduldig v. Arello,

Kahn v. Shevin, and Reed v. Reed.

The Minnesota statute requiring fathers to pay all medical bills without regard to ability discriminates against men in favor of women, although both are similarly situated, each having participated in conceiving the child and each being the parent of the child.

In Kalina v. Railroad Retirement Board, 541 Fed. 2d 1204 (6th Cir. 1976), the Sixth Circuit held that the Equal Protection component of the Fifth Amendment Due Process Clause was violated by a provision requiring the spouse of a retired female emplcyee but not the spouse of a retired male employee, to prove actual dependency in order to qualify for a spouse's annuity. The court said that the government's mere recitation of a benign compensatory purpose was no justification for the difference in treatment.

The Arkansas Supreme Court, in State of Arkansas v. Fairfield Communities Land Co., 260 Ark. 277, 538 S.W. 2d 698 (1976) found that a state statute which required payment of overtime wages to women in

clerical positions, but not to men, must be overturned because there was "no sound reason" for it.

The Massachusetts Supreme Judicial Court considered an Equal Protection attack on a Massachusetts paternity statute which provided criminal penalties for men who conceived a child out of wedlock, but not for women.

> "Judging §11 by this [Reed] Standard, we discern no permissible legislative goal which rationally is achieved by making a father, but not a mother, guilty of conceiving a child out of wedlock." Commonwealth v. MacKenzie, ___ Mass. ___, 334 N.E. 2d 613, 615 (1975).

While invalidating the criminal aspect of this statute, the court sustained the support portion, noting that support should be a shared obligation.

> "We conclude that the defendant's motion to dismiss the complaint was properly denied. A complaint under §11 may be used to initiate a proceeding to adjudicate paternity. See G.L. c. 273, § 12. Such an adjudication provides a basis for an order directing the father to contribute toward pregnancy expenses, (see G.L. c. 273, §13) and

> the support of the child (see G.L. c. 273 §§ 15 and 16). In such proceedings, the relative obligations of the father and the mother must be determined by applying an identical standard. Here an order directing the defendant to make certain payments would have been proper." Commonwealth v. McKenzie, at 616.

To the extent that the Minnesota Statute fails to permit consideration of the relative obligations and financial abilities of both the father and mother of an illegitimate child by applying an identical standard to the father and mother, it is unconstitutional.

The statute assigning the obligation of paying medical expenses solely to the father is not rationally related to legislative objective of indemnifying society against the expense of supporting the child. The same objective is more fairly and substantially achieved by apportioning the expense of the pregnancy between the two parents, after a hearing to determine their respective abilities to pay.

Susanne C. Sedgwick

April 25, 1977

(Ed. Nt. Names deleted by Order of Judge Sedgwick for protection of the privacy of the parties.)

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(TITLE OF CAUSE) August 31, 1977

SIR:

You will please take notice that on this date following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
John McCarthy
Clerk Supreme Court

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(TITLE OF CAUSE) NOTICE OF APPEAL

TO: APPELLEES ABOVE-NAMED and to . . .
Attorneys for Plaintiffs-Respondents:

I. NOTICE IS HEREBY GIVEN Pursuant to Rule 10 of the United States Supreme Court Rules, that the Defendant-Appellant above-named hereby appeals to the United States Supreme Court from the Judgment of the

Minnesota Supreme Court entered on August 31, 1977, Opinion #97 in Case 46553, cited as ___ Minn. ___, 257 N.W. 2d 282. The appeal herein is taken pursuant to 28 U.S.C.A. 1257(2), 28 U.S.C.A. 2106 and 28 U.S.C.A. 2101(c).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: All pleadings, briefs and decisions.

III. The following questions are presented by this appeal: Whether or not Minnesota Statutes 257.251 (major de facto section), et seq., specifically, 257.252, 257.257, 257.258, Subd. 3, 257.262 and 257.263, are unconstitutional because they deny the Defendant-Appellant herein equal protection of the law in

that they arbitrarily, solely on the basis of sex, treat him differently than they do the femal Plaintiff-Respondent when both are similarly situated as adjudicated parents of an illegitimate child.

Dated: November 17, 1977

/s/James Malcolm Williams
Attorney for Defendant-
Respondent
212 West Franklin Avenue
Minneapolis, Minnesota 55404
Telephone: (612) 871-8885

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